RE JOHOWNATHAN CHELLIAH; EX P INDUSTRIAL & COMMERCIAL INSURANCE (M) BHD

HIGH COURT MALAYA, SHAH ALAM
ROSNAINI SAUB JC
[BANKRUPTCY NO: 29-57-1989]

BANKRUPTCY: *Receiving and adjudication orders - Setting aside - Grounds - Triable issues - Whether raised - Whether debtor already raised same issues in another suit - Whether appropriate for court to reopen issues - Whether debtor failed to satisfy court that he ought not to have been adjudged a bankrupt - Whether adjudication and receiving orders be maintained - Whether application devoid of merit - Bankruptcy Act 1967, s. 105(1)*

BANKRUPTCY: *Receiving and adjudication orders - Setting aside - Application for - Delay - Application to set aside filed fourteen years after orders made - Whether there was valid and comprehensible excuse - Interest of creditors - Whether judgment creditor greatly prejudiced should orders be set aside - Whether adjudication and receiving orders be maintained - Whether application devoid of merits - Bankruptcy Act 1967, s. 105(1)*

This was an appeal by the undischarged bankrupt ('the debtor') against the decision of the senior assistant registrar dismissing the debtor's summons in chambers in encl. 31. The debtor, *vide* the said summons in chambers applied for the adjudication order and receiving order both dated 24 September 1990 to be set aside. The background facts were that the judgment creditor had instituted a civil suit against a company, Sargen Insurance Agencies Sdn Bhd ('the company') as first defendant and the debtor as second defendant in the High Court Kuala Lumpur ('KL suit'). The company was alleged to be indebted to the judgment creditor in respect of premiums payable under an agency agreement. The debtor was sued as a guarantor to the company. On 25 September 1987, the senior assistant registrar in the KL suit granted the judgment creditor a summary judgment against both the company and the debtor. The debtor's appeal to the judge in chambers against that summary judgment was struck off. On the basis of the said summary judgment it had obtained, the judgment creditor took out a bankruptcy notice dated 18 August 1989 against the debtor. The said bankruptcy notice was duly served on the debtor by way of substituted service. The creditor

petition followed suit and was again duly served on the debtor. The adjudication and receiving orders were made against the debtor on 24 September 1990. The debtor now filed this summons in chambers (encl. 31) applying to set aside the adjudication and receiving orders and made this application under s. 105(1) of the Bankruptcy Act 1967 ('the Act'). The debtor's main grounds or reasons for making the application were, *inter alia* (i) that the authenticity of the said guarantee was doubtful; (ii) that the purported guarantee was in fact a fraud and an illegal and void document as it was not properly stamped; and (iii) that the statements of account used by the judgment creditor were inaccurate and incomplete. However, the judgment creditor in his submission emphasized on the fact that the debtor had waited for almost fourteen years before making this application and strenuously denied all the allegations and averments made by the debtor in respect of the authenticity of the guarantee signed by the debtor.

Held (dismissing the appeal with costs):

(1) The debtor had already raised the same issues on the guarantee and the statement of account at the summary judgment proceeding in the KL suit. His allegation that the statements of account were inaccurate was purely a conjecture. The senior assistant registrar in the KL suit had certainly considered all these issues that were being raised herein by the debtor but nevertheless allowed the summary judgment to be entered against the debtor. In other words, the debtor had not raised any triable issue then. In the circumstances, it was not appropriate for this court to now reopen the issues. The debtor had been given all the opportunity to defend against the claim in the KL suit. This was not a genuine case where the debtor had been denied his right to defend the KL suit. (para 16)

(2) The debtor had made a futile attempt in the present proceeding to prove that the guarantee used by the judgment creditor to obtain the summary judgment was not genuine and tainted with fraud, particularly in respect of the stamping of the same. The testimony of one Subkiah Jamaludin of Bahagian Duti Setem was unable to confirm the allegation of the debtor that the guarantee was not properly stamped. In

fact, with her testimony, there was absolutely no doubt whatsoever that the guarantee was duly signed before it was stamped. Therefore, the testimony of one Subkiah was of no help to the debtor. (para 17)

(3) The adjudication and receiving orders were made against the debtor on 24 September 1990. The debtor filed this application on 12 July 2004, almost fourteen years after the orders were made. The debtor had absolutely no valid and comprehensible excuse for not making this application much earlier. He could not say that he was unaware of the adjudication and receiving orders all this time since he had affirmed in para. 8 of his affidavit in support (encl. 30) that on 12 November 1990 he was served with those orders by the Jabatan Insolvensi Malaysia. (para 21)

(4) The debtor had never made an assertion that he was solvent at the time when the act of bankruptcy was committed. There was also no challenge as to the regularity of the bankruptcy proceeding. The debtor had all the opportunities to contest the judgment creditor's claim at the earlier stages. This court must therefore consider the interest of the creditors, and in this case, the judgment creditor, who would be greatly prejudiced should the adjudication and receiving orders be set aside at this juncture. (para 24)

(5) This was not an appropriate case for the court to exercise its discretionary powers under s. 105(1) of the Act. The debtor had failed to satisfy this court that he ought not to have been adjudged a bankrupt. On the contrary, it was in the interest of justice that the adjudication and receiving orders be maintained. The debtor's application was devoid of merit. (para 25)

Case(s) referred to:

Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC ***(refd)***

In re Hester: Ex parte Hester [1889] LR 22 QBD 632 ***(refd)***

Re Amos William Dawe; Amos William Dawe v. Wayfoong Mortage And Finance (Singapore) Ltd [1980] 1 MLJ 200 ***(refd)***

Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248 ***(refd)***

Re Seow Yin Fong, ex p United Orient Leasing Company Berhad & Another Case [1994] 2 CLJ 845 HC ***(refd)***

A *Re Yap E Boon [1933] Vol 11 SSLR 217* ***(refd)***
Re Yong Tet On Paul, ex p Chung Khiaw Bank Ltd [1996] 1 CLJ 836 HC ***(refd)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia [1995] 2 CLJ 368 SC ***(refd)***

B **Legislation referred to:**
Bankruptcy Act 1967, ss. 92(1), 105(1), (5)

Other source(s) referred to:
Halsbury's Law of England, 4th edn, reissue, vol 3(2), paras 357, 599

C *For the judgment debtor/appellant - Johowathan Chelliah appearing in person*
For the judgment creditor/respondent - Freda Santhiago; M/s SN Fam & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Rosnaini Saub JC:

E **[1]** This is an appeal by the undischarged bankrupt, Johownathan Chelliah @ Johan bin Abdullah (referred to hereinafter as "the debtor"), against the decision of the learned senior assistant registrar given on 15 September 2005 dismissing the debtor's summons-in-chambers in encl. 31. The debtor, *vide* the said summons-in-chambers applied for the adjudication order F and receiving order both dated 24 September 1990 be set aside. It needed to be said that the debtor is ably represented by himself through-out this proceeding, though at one particular time Messrs. M. Manoharan & Co acted as his solicitor. The debtor has indeed filed "Notis Niat Pihak Untuk Bertindak Secara Sendiri" on 7 G March 2005. Freda Santiago is counsel for the judgment creditor.

[2] After considering the submissions of both the debtor and counsel for judgment creditor, I have on 3 May 2006 dismissed the debtor's appeal with costs. The debtor is now appealing H against my decision to the Court of Appeal. I will now give my full reasons for my earlier decision.

[3] First, the background facts of the case are necessary. The judgment creditor had instituted a civil suit against a company I known as Sargen Insurance Agencies Sdn. Bhd. ("hereinafter referred to as "the company") as first defendant and the debtor as second defendant, in the High Court at Kuala Lumpur under Civil Suit No. C3-24-5330-1986 (hereinafter referred to as "the

KL suit"). The company, pursuant to an agency agreement was appointed as underwriting agent by the judgment creditor for various types of general insurance and was alleged to be indebted to the judgment creditor in respect of premiums payable under the agency agreement. The debtor was sued as a guarantor to the company. On 25 September 1987, the senior assistant registrar in the KL suit granted the judgment creditor a summary judgment against both the company and the debtor. The debtor's appeal to the judge in chambers against that summary judgment was struck off by the learned judge due to non appearance of the debtor and his solicitor. For the sake of completeness, the judgment creditor was then known as Industrial & Commercial Insurance (M) Bhd.

[4] Then on the basis of the said summary judgment it had obtained, the judgment creditor took out a bankruptcy notice dated 18 August 1989 against the debtor. The said bankruptcy notice was duly served on the debtor by way of substituted service. The creditor petition followed suit and was again duly served on the debtor by way of substitued service. The adjudication and receiving orders were made against the debtor on 24 September 1990. The debtor did not attend court at any time during the bankruptcy proceeding to contest the creditor petition.

[5] Almost fourteen years later, the debtor filed this summons-in-chambers (encl. 31) applying to set aside the adjudication and receiving orders. The debtor is making this application under s. 105(1) of the Bankruptcy Act 1967 (hereinafter referred to as "the Act"). Section 105(1) of the Act provides as follows:

> Annulment of Adjudication
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> S 105 Power of court to annul adjudication in certain cases.
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> (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

[6] Section 105(5) of the Act then provides that when the court annuls an adjudication order under that section it shall also rescind the receiving order.

[7] It is plainly clear that the power of the court to annul a bankruptcy order under s. 105(1) of the Act is discretionary. And what is the scope of that discretion? *Abdul Hamid b. Mohamad, FCJ in Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809 had succinctly put it this way at p 819:

> ... it appears that the scope of discretion under s. 105(1) is not limited to technical defects, eg, defective service of the bankruptcy notice and/or the creditor's petition or that there was no debt due or that no act of bankruptcy was committed. Opinion is unanimous that abuse of process of the court is a ground for annulling the RO and AO under the first limb of s. 105(1). I think, abuse of process of the court may or may not be a "technical defect". So, I am of the view that the provision should not be read to cover only technical defects, but it is wider and includes other "legal grounds" like abuse of the process of the court (this is only an example). However, I do not think that it should be stretched too far to cover extraneous "moral" or "equitable" grounds. It has to be a legal ground as the court is only concerned with the law.

[8] His Lordship had made the above observation after looking into several previous case authorities pertaining to the subject, such as *In re Hester: Ex parte Hester* [1889] LR 22 QBD 632; *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [1995] 2 CLJ 368; *Re Yap E Boon* [1933] Vol 11 SSLR 217; and also to *Halsbury's Law of England*, 4th edn, reissue, vol 3(2) at para 599.

[9] It is also clear that the debtor herein is relying on the first limb of s. 105(1) of the Act, and as also decided in the *Bungsar Hill*''s case *(supra)*, the fact that the debtor did not contest the creditor petition did not automatically disqualify him from making this application but the non-appearance is still a factor to be considered when the court is exercising its discretionary power under that section. The burden is on the debtor to satisfy the court that he ought not to have been adjudged a bankrupt – see *Re Amos William Dawe; Amos William Dawe v. Wayfoong Mortage And Finance (Singapore) Ltd* [1980] 1 MLJ 200.

[10] Let us now look and examine at the circumstances of this case. The debtor's main grounds or reasons for making this application can be summarized as follows:

a. that the summary judgment obtained by the judgment creditor in the KL suit against the debtor and the basis in which the bankruptcy notice was issue, was based on a purported guarantee exhibited as "JC3" in the debtor's affidavit in support (also found in debtor's second affidavit marked as exh. "JC7"). The debtor contended that the authenticity of the said guarantee was doubtful. The debtor's case is that the purported guarantee was actually meant for a proposed firm to be named as Sargen Insurance Agencies (hereinafter referred to as "the proposed firm") that he intended to set up. The proposed firm was supposed to be appointed as the insurance agent by the judgment creditor but for reason known only to the judgment creditor, the company was instead being appointed as the insurance agent. As a result the debtor said that he did not proceed to register the proposed firm as a business entity. He alleged that the judgment creditor had used the purported guarantee meant for the proposed firm to obtain the summary judgment in the KL suit.

b. that the purported guarantee was in fact a fraud and an illegal and void document. It was undated and the amount guaranteed was not specified. Further it was not properly signed by a witness and was not properly stamped. In fact the debtor challenged the stamping on the said guarantee. A witness from the Lembaga Hasil Dalam Negeri (Bahagian Duti Setem), Puan Subkiah bt. Jamaludin, was called to testify before the learned senior assistant registrar.

c. that the statements of account used by the judgment creditor in the KL suit were inaccurate and incomplete.

d. that he was not properly represented during the summary judgment proceeding in the KL suit. The debtor alleged that his counsel on record in the KL suit, Mr. V Ramanathan of Messrs Shaharuddin & Associates, was not present at the hearing of the summary judgment's application and denied appointing any other solicitor to represent him at that hearing.

[11] In a nutshell, the debtor is saying that due to the above circumstances in which the summary judgment was obtained by the judgment creditor in the KL suit, this court should exercise its discretionary power under the first limb of s. 105(1) of the Act and set aside the adjudication order.

[12] The learned counsel for the judgment creditor in his submission emphasised on the fact that the debtor has waited for almost fourteen years before making this application. It is also submitted by the learned counsel that the debtor is basically asking this court to look behind the summary judgment that was regularly obtained after both sides were heard. The judgment creditor strenuously denied all the allegations and averments made by the debtor in respect of the authenticity of the guarantee signed by the debtor.

[13] There are previous case authorities that seem to suggest that a bankruptcy court will in appropriate cases go behind the judgment and enquire into the validity of the debt. One such case heavily relied upon by the debtor is *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248 where VC George J set aside the adjudication and receiving orders made against the bankrupt on the ground that the judgment was obtained on the basis of an unenforceable contract. However, it is pertinent to note that the particular judgment in that case was a default judgment and his Lordship at the end of his judgment did mention that he was exercising the court's power of review pursuant to s. 92 of the Bankruptcy Act to set aside the adjudication and receiving orders.

[14] In our present case, the judgment was a summary judgment obtained by the judgment creditor after arguments from both side were heard. Further our case is an application under s. 105(1) of the Act. The debtor is highly critical of the manner in which the summary judgment was entered against him. He first gave the impression that he was not represented at the summary judgment proceeding in the KL suit and then he alleged that the lawyer that appeared for him at the said proceeding was not authorized to do so by him. This is incredible, to say the least. But one thing is certain, that is, he was indeed represented at the hearing. I need only to look at the order dated 25 September 1987 by the senior assistant registrar in the KL suit (exh. "LAC3" of the judgment creditor's affidavit – encl. 33) where it clearly stated that one Mr. Ravi was the counsel for the debtor.

[15] I have scrutinized the affidavits filed by both parties regarding the issues of the guarantee and the statements of account. The judgment creditor's affidavit per encl. 33 has exhibited the two affidavits of the judgment creditor (exhs. "LAC

4" and "LAC6") and one affidavit of the debtor (exh. "LAC5") filed in the KL suit in respect of the summary judgment application. It can be clearly seen that the debtor had already raised the same issues on the guarantee and the statement of account at the summary judgment proceeding in the KL Suit, that is, the purported guarantee was for the proposed firm and not meant for the company, and that the statement of account was inaccurate. His allegation that the statements of account were inaccurate is purely a conjecture. Just because the statements of account were handwritten, the debtor presumed they were inaccurate. By the way, the copies of statements of account used in the KL Suit, together with the agency agreement and the guarantee are not produced through exhibits but by way of a bundle of documents. The debtor produced them in such manner as the judgment creditor had not exhibited the same in its affidavit.

[16] The learned senior assistant registrar in the KL suit had certainly considered all these issues that are now being raised by the debtor but nevertheless allowed the summary judgment to be entered against the debtor. In other words, the debtor has not raised any triable issue then. The debtor did appeal against that decision of the senior assistant registrar but his appeal was dismissed due to non-appearance of the debtor and his solicitor. In the circumstances, I do not think it is appropriate for this court to now reopen the issue. The debtor has been given all the opportunity to defend against the claim in the KL suit. Now, almost fourteen years later he is trying to do the same. I therefore think that this is not a genuine case where the debtor has been denied his right to defend the KL suit.

[17] Further, the debtor has made a gallant but futile attempt in the present proceeding to prove that the guarantee used by the judgment creditor to obtain the summary judgment was not genuine and tainted with fraud, particularly in respect of stamping of the same. The testimony of Puan Subkiah bt. Jamaludin of Bahagian Duti Setem is actually neither here nor there. She was unable to confirm the allegation of the debtor that the guarantee was not properly stamped. In fact, with her testimony, there is now absolutely no doubt whatsoever that the guarantee was duly signed before it was stamped. Therefore, the testimony of Puan Subkiah is of no help to the debtor.

[18] In *Re Yong Tet On Paul, ex p Chung Khiaw Bank Ltd* [1996] 1 CLJ 836 the High Court in Kota Kinabalu dismissed an application by the debtor to set aside the adjudication and receiving orders. In that case the debtor initially filed an application pursuant to s. 92(1) and s. 105(1) of the Act and the application was duly dismissed. Then the debtor by way of motion made another attempt to set aside the adjudication and receiving orders. Ian Chin, J in dismissing the motion made the following remarks:

> I agree with the learned counsel that the debtor is attempting by the present motion to challenge a decision of a court of competent jurisdiction which decision the debtor did not pursue the appeal he had filed and the motion is an abuse of the process of the court.
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> In any event and since the court has a discretion, I cannot see any factors in favour of the debtor that should move the court in exercising its discretion in his favour ... He never explained why he took out the present motion on 7 August 1991, when he was adjudged a bankrupt more than four years earlier on 30 April 1986.

[19] Similarly in our present case, the debtor is attempting to reopen the issues already argued and adjudicated in the summary judgment proceeding in the KL suit. The summary judgment is a regular judgment. It is my considered opinion that this court, being a bankruptcy court, should be slow and hesitant to go behind a judgment that have been regularly obtained on merits and where the parties has been heard unless the debtor can show fraud or collusion (see para 357 of *3 Halsbury's Law of England* (4th edn)).

[20] In *Re Seow Yin Fong; Ex parte: United Orient Leasing Company Berhad & Another Case* [1994] 2 CLJ 845 the application to set-aside the adjudication and receiving orders pursuant to s. 105(1) of the Act was dismissed with costs on the ground, *inter alia,* that it was made six years after the grant of the said orders and that no explanation was given for the delay. The court in that case also considered the fact that the interest of creditors will be prejudiced due to the delay on the part of the debtor in making the application.

[21] The adjudication and receiving orders in our present case were made against the debtor on 24 September 1990. The debtor filed this application on 12 July 2004, that is almost 14 years after the orders were made. In his affidavit in support (encl. 30), the debtor blamed his marital problem and health condition that

caused severe mental stress to him for being unable to file this application expeditiously. I find that this is a very weak reason and I am not that gullible to swallow such reason 'hook, line and sinker'. The truth is that the debtor has absolutely no valid and comprehensible excuse for not making this application much earlier. He cannot say that he was unaware of the adjudication and receiving orders all this time since he has affirmed in para 8 of his affidavit in support (encl. 30) that on 12 November 1990 he was served with those orders by the Jabatan Insolvensi, Malaysia (then known as Jabatan Pemegang Harta).

[22] This court must, before exercising its discretionary powers under s. 105(1) of the Act, take into account all relevant factors and circumstances of the case. In *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia (supra)* the then Supreme Court at p. 372 observed as follows:

> The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same ... All relevant facts and circumstances must be considered.

[23] Even though in *Bungsar Hill*'s case *(supra)* the Federal Court held that the court possesses a wide discretionary power to set aside an adjudication order under s. 105(1) of the Act, whether such power should be exercised or not depends on the circumstances of each case. In that case the Federal Court agreed with the High Court and the Court of Appeal that the adjudication and receiving orders ought to be set aside on the ground that the debt to the petitioning creditor was not in existence on the date of the act of bankruptcy was alleged to have been committed. Further, it was also found that the debtor was solvent and was able to pay his debt.

[24] In our case, the debtor never makes an assertion that he was solvent at the time when the act of bankruptcy was committed. There is also no challenge as to the regularity of the bankruptcy proceeding. The debtor has all the opportunities to contest the judgment creditor's claim at the earlier stages. This court must therefore consider the interest of the creditors, and in this case the judgment creditor, who will be greatly prejudiced should the adjudication and receiving orders be set aside at this juncture.

A **[25]** In the final analysis, I find that after taking into consideration all relevant facts and circumstances, this is not an appropriate case for the court to exercise its discretionary powers under s. 105(1) of the Act. The debtor has failed to satisfy this court that he ought not to have been adjudged a bankrupt. On
B the contrary, I find that it is in the interest of justice that the adjudication and receiving orders be maintained.

[26] The debtor's application is devoid of merit and consequently this appeal is therefore dismissed with costs.

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